

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-555

CLYDE R. DONNELL, *et al.*,
Appellants,

v.

UNITED STATES, *et al.*, and EDDIE THOMAS, SR., *et al.*,
Appellees

On Appeal from the United States District Court
for the District of Columbia

MOTION TO AFFIRM OF PRIVATE
APPELLEES, EDDIE THOMAS, SR., ET AL.

FRANK R. PARKER
Lawyers' Committee for
Civil Rights Under Law
Post Office Box 1971
Jackson, Ms. 39205
(601) 948-5400

WILLIAM L. ROBINSON
RICHARD S. KOHN
Lawyers' Committee for
Civil Rights Under Law
520 Woodward Building
733 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 628-6700

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*Attorneys for Private Appellees,
Eddie Thomas, Sr., et al.*



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The private appellees, Eddie Thomas, Sr., Charlie Steele, Frank H. Summers, St. Clair Mitchell, Mrs. Charlie Hunt, Tommie Lee Williams, and Willie Jordan, black voters of Warren County, Mississippi, move the Court pursuant to Rule 16 of the Rules of the Supreme Court of the United States to affirm the final judgment of the District Court on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the opinion and final judgment of the three-judge District Court for the District of Columbia convened pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The District Court held that the appellant members of the Warren County, Mississippi, Board of Supervisors—plaintiffs below—had failed to prove that their proposed 1978 county redistricting plan does not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color and denied their prayer for a declaratory judgment under § 5. In rejecting the Board's plan, the District Court found that the proposed plan unnecessarily divided the black population concentration in Warren County among four irregularly shaped districts (J.S., App. A, p. 6a), that the Board members knew that the proposed plan split up black population concentrations and that the districts were neither compact nor contiguous (*id.*), that there were alternatives to this fragmentation (*id.*, p. 8a), that the Board had offered "no valid nonracial justification" for the dilution of black voting strength within the City of Vicksburg (*id.*, p. 10a), and that the proposed districts reduced the black percentages of existing districts to the point that it was "unlikely that black citizens will be able to elect a candidate of their choice in any of the districts" (*id.*, pp. 9a-10a). On these findings, which are amply supported by the record and not challenged as clearly erroneous in this appeal, the judgment of the District Court should be affirmed.

A. Prior Proceedings

This action is a continuation of the efforts of the all-white Warren County Board of Supervisors, in a county which is 41% black, to maintain all-white county government, to exclude any opportunities for black representation, and to maintain themselves in office through re-

peated racial gerrymandering of county supervisors' district lines and blatant disregard of the requirements of § 5 of the Voting Rights Act.

Warren County is located in west central Mississippi on the Mississippi River. The county governing board is the Board of Supervisors; each of the five members is elected from one of five supervisors' districts to four-year terms of office. Supervisors' districts also serve as election districts for justice court judges, constables, and, beginning in 1980, members of the county board of election commissioners.

Warren County, like most Mississippi counties, has an extensive history of racial discrimination affecting the right to vote. Literacy tests, the poll tax, and the white primary prior to the passage of the Voting Rights Act effectively excluded black persons in Mississippi and Warren County from the exercise of the franchise (J.S., App. A, p. 8a). This past history of racial discrimination continues to cause a lesser participation by blacks than whites in the political process (*id.*), as reflected by disproportionately lower black registration (*id.*, p. 3a). Racial bloc voting also consistently prevails in Warren County elections (*id.*, p. 9a).

Warren County has not had lawful county-district elections¹ since 1967 as a result of the continuing efforts of the all-white Board of Supervisors to gerrymander black voting strength and flagrantly to disregard their clear obligations under § 5 of the Voting Rights Act. The 1971 district elections were held under a county redistricting plan objected to by the United States Attorney General under § 5 of the Voting Rights Act, and the 1975 district elections were never held.

¹ "County-district" elections is the Mississippi statutory term for election of county officers from the respective supervisors districts, sometimes referred to as "beats."

Prior to the first recent redistricting in 1970, Warren County had three majority black districts which were 64.0%, 55.9% and 50.7% nonwhite in population, all located within the City of Vicksburg, the county seat (*id.*, p. 4a).² Two of the districts had nonwhite voting age population majorities of 60.2% (District 2) and 50.5% (District 4) (*id.*). This districting had been in effect from 1929 to 1970 (*id.*). In 1970, the Board adopted a new county redistricting plan (hereinafter the 1970 plan), which split up the three majority black districts in Vicksburg—where most of the black population is concentrated—and reduced the number of majority black districts to two districts with slight black population majorities of only 56.6% and 51.0%.³ The 1970 plan was submitted by the Board to the United States Attorney General for the required § 5 preclearance, additional information was requested and submitted, and on April 4, 1971 the Attorney General entered an objection to the plan finding that discrepancies between the population figures submitted by the Board's planning agent, Comprehensive Planners, Inc. (CPI), and 1970 Census data made it impossible for the Department of Justice to determine that the plan would not have a racially discriminatory effect.⁴ Subsequently, the Board submitted additional statistical information to the Department of Justice, but the Department found the additional data subject to "the same infirmities" present in the

² A map showing the district boundaries of the pre-1970 plan, sometimes referred to as the "1929 plan," is attached to the Jurisdictional Statement as Map 1. The boundaries of the three majority black districts within Vicksburg—Districts 2, 3 and 4—were extremely compact and contiguous.

³ Intervenor's First Req. for Admissions, ¶¶ 10, 12.

⁴ Letter from Jerris Leonard, Asst. Attorney General, Civil Rights Division, U.S. Dept. of Justice to Landman Teller, attorney for the Warren County Bd. of Supervisors, April 4, 1971.

original data, and declined on August 23, 1971 to withdraw the objection.⁵

Despite the Attorney General's express § 5 objection to the 1970 plan, and his express refusal to withdraw that objection, the Board of Supervisors illegally and wrongfully in violation of § 5 conducted the 1971 August primaries and November general election on the basis of the objected-to 1970 plan. *United States v. Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642, 643 (1977). Two black supervisor candidates in the two marginally black districts were soundly defeated by white opponents.⁶

Subsequently, the Board submitted supplemental data on its 1970 plan to the Department of Justice, and on February 13, 1973 the Attorney General determined on the basis of the additional information that

"the effect of the proposed district boundary lines is to fragment areas of black population concentrations, thereby minimizing the total number of black persons residing in each of the districts and diluting black voting strength in Warren County.

Moreover, it does not appear that the district lines are drawn as they are because of any compelling governmental need and they do not reflect population concentrations in the county or considerations of district compactness or regularity of shape. Under these circumstances, we find no basis for withdrawing the objections to the implementation of this redistricting plan interposed by our letter of April 4, 1971."⁷

⁵ Letter from David Norman, Asst. Attorney General, Civil Rights Division, U.C. Dept. of Justice to Teller, August 23, 1971.

⁶ Intervenor's First Req. for Admission, ¶ 14.

⁷ Letter from J. Stanley Pottinger, Asst. Attorney General, Civil Rights Division, U.S. Dept. of Justice to John W. Prewitt, attorney for the Warren County Bd. of Supervisors, February 13, 1973.

On March 7, 1973, the Department of Justice restated its position with regard to the 1970 plan, and noted that "because the objectionable redistricting plan was legally unenforceable at the time the 1971 county supervisor elections were held, those elections were unlawful."⁸

On October 31, 1973, the United States filed an action in the District Court for the Southern District of Mississippi to enforce the Attorney General's § 5 objection to the 1970 plan, *United States v. Board of Supervisors of Warren County, Mississippi*, Civil No. 73W-48(N), and a three-judge District Court was convened (J.S., App. A, p. 5a). On June 19, 1975, the District Court granted summary judgment in favor of the United States and enjoined the 1975 county-district elections (*id.*). The District Court then ordered submission of new county redistricting plans, and when the Attorney General objected to the Board's new proposed 1976 plan for dilution of black voting strength (J.S. p. 7), the District Court itself on May 13, 1976, approved and ordered into effect the Board's new 1976 plan and established a schedule for the postponed county-district elections (*id.*).

On appeal to this Court, in which some of the appellees here were permitted to appear as amicus curiae, this Court by a unanimous vote summarily reversed the judgment of the Mississippi District Court and held that it "twice exceeded the permissible scope of its § 5 inquiry," which was "limited to the determination whether 'a [voting] requirement is covered by § 5 but has not been subjected to the required federal scrutiny.'" *United States v. Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642, 645-46 (1977). The District Court erred both in enjoining the holding of the 1975 county-district elections for violations of the Fourteenth and Fifteenth Amendments and in approving the Board's new

⁸ Letter from Pottinger to Prewitt, March 7, 1973.

plan under the Fifteenth Amendment and ordering it into effect. *Id.*⁹

The postponed 1975 county-district elections have never been held. The illegally-elected, all-white Board of Supervisors remains in office today, and it is their new 1978 plan which is the subject of this proceeding.

B. Proceedings Below

Following the 1977 decision of this Court, the Warren County Board of Supervisors instructed the planning firm which had drafted its 1970 and 1976 plans, Comprehensive Planners, Inc., to prepare a new county redistricting plan (J.S., App. A, p. 6a). Instead of submitting the new 1978 plan to the Attorney General for § 5 review, the members of the Board on March 6, 1978 filed this action in the District Court for the District of Columbia seeking a § 5 declaratory judgment that their 1978 plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. § 1973c. The defendants are the United States and the Attorney General. The private appellees, Eddie Thomas, Sr., et al., who are seven black citizens and registered voters of Warren County adversely affected by the Board's proposed plan, were granted leave to intervene on June 15, 1978.

⁹ In ordering the Board's plan into effect, the Mississippi District Court made certain findings which appellants in their Jurisdictional Statement here extensively quote and upon which they rely (J.S., pp. 7-8, 22) and which are attached as an appendix to their Jurisdictional Statement (Appendix F). Because that court's May 13, 1976 decision—upon which appellants rely—was summarily reversed by this Court on jurisdictional grounds, appellants' reliance on those findings flagrantly transgresses the bounds of proper argument and should be completely disregarded by this Court. Of course, in holding that the Mississippi District Court lacked jurisdiction to approve the Board's plan, this Court did not reach the merits of that plan.

After extensive discovery, and oral argument on the entire record, the District Court on July 31, 1979 entered its findings of fact and conclusions of law and denied plaintiffs' request for a declaratory judgment. The District Court found that the black population of Warren County is most heavily concentrated in 20 majority black Census enumeration districts in central and north Vicksburg and north of Vicksburg in the rural area; this area includes 68% of the total black population of the county and is 71% black in racial composition (J.S., App. A, p. 3a). Under the proposed plan, this heavy black population concentration is dispersed among four of the five proposed districts; at one point a one-block black residential area is divided among three districts (*id.*, p. 6a). Unlike the 1929 plan—which was the existing plan—all five districts take in both rural and urban area and divide the City of Vicksburg among all five districts (*id.*).¹⁰ The proposed districts “are not compact and follow irregular boundaries through the City of Vicksburg,” and one portion of proposed District 4 is noncontiguous with the rest of the district (*id.*).

The proposed plan reduces the number of majority black districts from three to two, and substantially reduces the black population percentages of the existing majority black districts. District 2 is reduced from 64.0% nonwhite in population to 60.6% nonwhite; Dis-

¹⁰ A map showing the boundaries of the proposed county re-districting plan is attached to the Jurisdictional Statement as Map 3. On this map the majority black Census enumeration districts of Warren County are shaded in gray. This map graphically shows that the proposed plan creates five oddly shaped districts which extend from the far corners of the county in long, narrow corridors into the City of Vicksburg (in the west central portion of the county), where 68% of the black population is concentrated, fragmenting this black population concentration among four districts (District 1, 2, 3, and 4). District 4, which stretches from the extreme south-western part of the county into northeast Vicksburg, closely resembles the prehistoric dinosaur, *Tyrannosaurus Rex*.

trict 3 is reduced from 50.7% nonwhite to 40.2% nonwhite; and District 4 is reduced from 55.9% nonwhite to 23.8% nonwhite (*id.*, pp. 4a, 7a). The black percentage of District 1 is increased from 39.6% nonwhite to 61.0% nonwhite (*id.*). Although under the existing plan District 2 was 60.2% nonwhite in voting age population, none of the proposed districts attain this percentage. District 1 is only 57.2% nonwhite in voting age population, and the nonwhite voting age population of District 2 is reduced to 58%. (*id.*)

The District Court found that "Warren County's past history of racial discrimination in voting continues to affect black persons in the county causing a lesser participation by blacks than whites in the political process" (*id.*, p. 8a), that the socio-economic position of blacks in Warren County is substantially lower than white residents (*id.*, p. 3a), that blacks suffer from disproportionately lower voter registration than whites (*id.*), and that racial bloc voting has consistently prevailed and continues to prevail in Warren County elections (*id.*, p. 9a). As a result of these factors, an election district must be at least 60% black in voting age population to enable black citizens to have an equal chance to elect candidates of their choice (*id.*, p. 9a). Under the existing plan, District 2 was 60.2% black in voting age population; however, under the proposed plan "no district has a voting age population greater than 58% black and thus, under the proposed plan, it is unlikely that black citizens will be able to elect a candidate of their choice in any of the districts" (*id.*, pp. 9a-10a).

The District Court also found that the members of the Board of Supervisors were aware that the boundary lines of the proposed plan divided the black population concentrations within Vicksburg, and that the districts as drawn were neither compact nor contiguous (*id.*, p. 6a). Plaintiffs failed to show that there were no alternatives which

would have equalized the population among the districts without splitting up black population concentrations or reducing black voting strength (*id.*, p. 8a), and offered "no valid nonracial justification for the district lines within the City of Vicksburg which result in irregularly shaped districts, fragment the black community and cause a diminution in black voting strength" (*id.*, p. 10a). The three stated criteria for the proposed plan were: equalization of road and bridge maintenance, equalization of population, and retention of presently existing election districts and availability of voting places (*id.*, p. 7a). Pursuit of these criteria failed to justify the proposed plan, however. Equalization of road and bridge maintenance was a brand new criterion; it had not been utilized from 1929 to 1970 (*id.*). Further, the county has no responsibility for road and bridge maintenance in the City of Vicksburg; therefore "equalization of road and bridge maintenance is not a justification for the proposed district lines within the City of Vicksburg" (*id.*). Also, none of the presently existing election precincts within the City of Vicksburg are left intact in the proposed plan (*id.*)

On these findings, which are not challenged in this appeal, the District Court held that the plaintiffs had failed to show the absence of a discriminatory purpose or effect and—pursuant to this Court's decision in *Beer v. United States*, 425 U.S. 130 (1976)—failed to show that the proposed plan would not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise (*id.*, pp. 11a-12a).

Plaintiffs filed their notice of appeal on August 6, 1979. Their motion to expedite this appeal was denied by the Court on October 15.

C. Subsequent Proceedings

Prior to and following the District Court's judgment, the Warren County Board of Supervisors made every effort completely to halt the electoral processes and suspend democratic government in Warren County. On or before June 8, the statutory qualifying deadline for party primary candidates,¹¹ six blacks and four whites qualified with the Warren County Democratic Executive Committee to run for county-district offices in the August 7 Democratic primary under the pre-1970 plan, which—in the absence of § 5 preclearance of the Board's 1978 plan—constituted the existing county districting plan (J.S., App. A, p. 4a). The Board immediately took steps to stop the 1979 county-district elections from taking place.

First, the Board on June 15 filed in *United States v. Board of Supervisors of Warren County, Mississippi, supra*—the Justice Department § 5 objection enforcement action—a motion to expand the extrajudicial 1975 District Court injunction against the 1975 county-district elections to enjoin the 1979 county-district elections as well. In a memorandum in support of their motion, the Board argued that the mere pendency of § 5 preclearance proceedings *ipso facto* freezes the electoral processes of Warren County. On July 30 the District Court—noting this Court's 1977 ruling that the three-judge District Court had exceeded the limited scope of its § 5 inquiry in enjoining the 1975 county-district elections—denied the motion for lack of jurisdiction.

Second, undaunted by the refusal of the Mississippi District Court to enjoin the 1979 county-district elections, the Board took it upon itself to prevent these elections from taking place by refusing to perform its statutory duties under Miss. Code Ann. §§ 23-5-11, 23-5-13, and 23-5-179 (1972). On July 31 the Board unilaterally re-

¹¹ Miss. Code Ann. §§ 3118, 3121 (1956 Recomp.).

fused to provide the Warren County Democratic Executive Committee with the boundaries of the election districts and the poll books with which to conduct the August 7 Democratic primary for county-district officers. Again, the Board argued that its § 5 preclearance proceedings prevented any elections from taking place, even in the absence of any court order staying or enjoining the scheduled elections. On August 1, two black district candidates who qualified to run in the August 7 Democratic primary filed a petition for a writ of mandamus in the Circuit Court of Warren County to compel the Board to perform its statutory duties.¹² At a hearing on the petition, held after the District of Columbia District Court entered its decision, the Board argued again that § 5 automatically freezes the electoral processes of a covered jurisdiction until preclearance of the submitted plan has been obtained. The state court, holding that the matter was still pending in Federal court, denied the mandamus petition on August 3 (J.S., App. C).¹³

The private intervenors then filed a motion for clarification and for declaratory and injunctive relief in the District Court for the District of Columbia seeking declaratory and injunctive relief to compel the Board to hold the 1979 county-district elections on the basis of the existing districts in the pre-1970 plan. The Board re-

¹² *Eddie Thomas, Sr., and Charlie Hunt v. Warren County Board of Supervisors, et al.*, Docket No. 12,190 (Cir. Ct. Warren County).

¹³ After the August 7 Democratic primary, the Warren County Democratic Executive Committee determined that county-district primaries were unnecessary because only one candidate had qualified for each of the county-district offices, and certified those candidates as the Democratic nominees. Subsequently, the Board of Supervisors filed an action in the Chancery Court of Warren County seeking to enjoin the Warren County Board of Election Commissioners from placing these county-district candidates on the general election ballot as Democratic nominees. *Donnell v. Warren County Board of Election Commissioners*, Docket No. 27,666 (Ch. Ct. Warren County, filed August 14, 1979).

sponded that it was justified in unilaterally suspending the electoral processes of Warren County "to insure that a total destabilization of county government did not occur due to the adverse decision."¹⁴ On August 23 the D.C. District Court issued an order declaring that "the filing of a Section 5 declaratory judgment law suit did not have the effect of 'freezing' the election process" and that the 1979 county-district elections should be conducted under the pre-1970 districts, pending preclearance of any new plan (J.S., App. B, p. 13a).

Finally, on August 30 six white voters of Warren County (including four county-district officials, but no members of the Board) filed a Fourteenth Amendment-§ 1983 action in the District Court for the Southern District of Mississippi alleging that the pre-1970 districts were unconstitutionally malapportioned, and obtained a temporary restraining order against holding the 1979 general election for district officials under the pre-1970 plan. *Herbert C. Stokes, Jr., et al. v. Warren County Election Commission, et al.*, Civil No. J79-0425 (C) (S.D. Miss., Order of Sept. 7, 1979) (J.S., App. D, pp. 19a-23a). Three black voters, and subsequently the members of the Board of Supervisors, intervened in that action, and the United States represented by the Department of Justice appeared as *amicus curiae*. After two hearings, at which the District Court held the existing districts unconstitutionally malapportioned, the District Court called for the submission of proposed court-ordered plans. On September 20 the District Court adopted the Justice Department's submission as a court-ordered plan, and ordered a special election for county-district officers to be held November 27. *Stokes v. Warren County Election Commission, supra*, Findings of Fact, Conclusions of

¹⁴ Plaintiffs' Memorandum in Response to Intervenor's Motion for Clarification and for Declaratory and Injunctive Relief, Aug. 20, 1979, p. 6.

Law and Preliminary Injunction, filed Sept. 20, 1979 (J.S. App. E, pp. 25a-30a). The District Court-ordered plan provides for five supervisors' districts which are substantially equal in population, two of which are majority black—District 2, which is 65.30% black in population and 62.74% black in voting age population, and District 3, which is 67.06% black in population and 64.55% black in voting age population. Thus, under the criteria adopted by the District Court in this case, black voters of Warren County for the first time since 1967 will now have the opportunity to elect candidates of their choice to county-district office in two districts.

The decision of the D.C. District Court itself did not cause any "chaos" (J.S., p. 11); any chaos was caused by the Board itself in refusing to comply with the law and conduct county-district elections under the existing plan. To the members of the Board, the requirement that 1979 county-district elections must be conducted most certainly must be "devastating and devisive" (*id.*). Having been unlawfully elected in 1971 under a gerrymandered plan in violation of the requirements of § 5 of the Voting Rights Act, and having been perpetuated in office for eight years by an unlawful 1975 election injunction, the members of the all-white Board must now submit themselves to the democratic process under a fair and non-discriminatory county redistricting plan.

Implementation of this court-ordered plan has been strenuously resisted by the Board. On September 18 the members of the Board filed their motion in *Stokes* to intervene, and asked the District Court to enjoin the 1979 county-district elections and to stay all further proceedings pending their appeal in this action. On September 19, the Mississippi District Court allowed their intervention, but denied their motion for a stay. On October 9 the Board appealed the *Stokes* decision to the Fifth Circuit, and on October 10 moved the Fifth Circuit for a

stay of the court-ordered plan and special election pending their appeal in this case. On October 15, the Fifth Circuit denied their motion for a stay. The Board then applied to this Court for a stay, which was denied by Mr. Justice Powell on October 26. *Clyde R. Donnell, et al. v. Eddie Thomas, et al.*, No. A-352.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IS MANIFESTLY CORRECT, AND THIS APPEAL PRESENTS NO SUBSTANTIAL QUESTIONS WHICH REQUIRE PLENARY CONSIDERATION BY THIS COURT.

The only question presented in this appeal is whether the District Court for the District of Columbia correctly applied the statutory criteria of § 5 of the Voting Rights Act and the controlling decisions of this Court in holding that plaintiffs had failed to meet their § 5 burden of proving that their new plan had no racially discriminatory purpose or effect. Under the facts of this case, and controlling legal precedents, the District Court's decision is manifestly correct.

There is no dispute that the Board of Supervisors—as plaintiffs—had the burden of proving that their proposed plan “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.” 42 U.S.C. § 1973c; *Beer v. United States*, 425 U.S. 130, 140 (1976); *City of Richmond v. United States*, 422 U.S. 358, 362 (1975); *Georgia v. United States*, 411 U.S. 526, 538 (1973). In determining whether plaintiffs had met their burden, the District Court correctly applied the controlling decisions of this Court. Thus, on the issue of racially discriminatory effect,¹⁵ the District Court correctly held:

¹⁵ Appellants in relying exclusively on *Beer v. United States*, *supra*, which concerned only the “effect” standard of § 5, appar-

"In order to prove the absence of discriminatory effect, plaintiffs must show that the voting change at issue would not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Beer v. United States*, 425 U.S. 130, 141 (1976); *State of Mississippi v. United States*, Civil Action No. 78-1425 (June 1, 1979, D.D.C.), Conclusions of Law No. 10." J.S., App. A, p. 11a (Conclusions of Law, No. 9).

On the facts showing that the proposed districts fragmented and dispersed all three majority black districts in the existing plan, reduced the number of districts which were majority black in population from three to two, and substantially reduced the black population and voting age population percentages contained in all three majority black districts to the point where "it is unlikely that black citizens will be able to elect a candidate of their choice in any of the districts" (J.S., App. A, pp. 9a-10a), the District Court correctly held that plaintiffs had failed to meet their burden of proving that the proposed plan would not diminish black voting strength.

Appellants contend that consideration by the District Court of any of the factors governing the conditions under which black voters may elect candidates of their choice is inconsistent with this Court's decision in *Beer v. United States*, *supra*. Thus, they contend that the District Court contravened *Beer* in making findings concerning the past history of discrimination in the voting process, the disproportionately low level of black regis-

ently do not challenge the holdings of the District Court that they failed to prove that the plan did not have a racially discriminatory purpose. In any event, the unchallenged findings of fact of the District Court are sufficient to sustain the conclusion that the absence of a racially discriminatory purpose had not been shown. See, e.g., *Connor v. Finch*, 431 U.S. 407, 421-26 (1977); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Robinson v. Commissioners Court*, 505 F.2d 674 (5th Cir. 1974).

tration, the disproportionately lower socio-economic position of black citizens, racial bloc voting, and the historic exclusion of black representation in county government (J.S., pp. 13-21).

There is no conflict with *Beer*. In that case this Court explicitly held (425 U.S. at 141):

"When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that 'the standard [under § 5] can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting' H.R. Rep. No. 94-196, p. 60 (emphasis added). In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." (Footnote omitted.)

Thus, under *Beer* findings on the current conditions under which black voters can gain representation is absolutely necessary to a determination whether their ability "to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting" and to a determination on the effect of the change "with respect to their *effective exercise* of the electoral franchise" (emphasis added).¹⁶

¹⁶ Analysis of what appellants characterize as *White v. Regester*, 412 U.S. 755 (1973), voter-dilution criteria (J.S., p. 17) showing denial of equal access to the political process may also be relevant in § 5 cases to a determination whether proposed voting changes "continue so to discriminate on the basis of race or color as to the unconstitutional." *Beer v. United States*, *supra*, 425 U.S. at 142 n.14. See, e.g., *Connor v. Finch*, *supra*, 431 U.S. at 422 n.22.

The District Court's finding that districts must be 60% black in voting age population to enable black voters to elect candidates of their choice is neither inconsistent with *Beer* nor arbitrary. In *Beer*, actual figures of registered voters were available and considered to determine whether blacks had a voting majority in any of the challenged districts (425 U.S. at 135-36, 142). In Warren County, there are no records showing the present number of registered voters by race (J.S., App. A, p. 3a); hence racial population and voting age population figures must be used to determine the effect of the new plan on present levels of black voting strength. Further, the District Court's finding on this issue is directly supported by the factual record. Plaintiffs' own expert witness, Dr. Linda Malone, a statistician from Mississippi State University, conceded that in Warren County an election district would have to be at least 63.06% black in population and 59.6% black in voting age population for a black candidate to be successful.¹⁷

Appellants are not even consistent in their argument on what questions are presented in this appeal. After arguing for nine pages in their Jurisdictional Statement that the decision of the District Court "is at war with *Beer*" (J.S., p. 21), they then take the tack that the *Beer* analysis is not even relevant to this case (J.S., pp. 21-23). In doing so, appellants make the remarkable concession that under the *Beer* test their plan is retrogressive:

"The issue, therefore, is not an increase of black-majority districts as in *Beer*. What is involved is an overall upgrading in black voting strength *albeit the percentage level previously attained (in one district) has been reduced.*" J.S., p. 22 (last emphasis added).

Appellants' argument that the equalization of county-maintained road mileage and bridges "deemed funda-

¹⁷ Deposition of Dr. Linda Malone, pp. 16, 92, Ex. P-5.

mental to improving the day-to-day functioning of county government" (J.S., p. 21) should justify dilution of black voting strength in the proposed plan also fails to present a substantial question. The District Court found that pursuit of this criterion failed to defeat the other evidence of a discriminatory purpose and effect because this purported criterion had not been utilized until after passage of the Voting Rights Act, equalization of these factors did not justify fragmentation of black voting strength in Vicksburg because the county has no responsibility for road and bridge maintenance in Vicksburg, and plaintiffs had failed to show that nondiscriminatory alternatives were not available (J.S., App. A, pp. 7a-8a, Findings of Fact Nos. 27-31). These findings are not challenged as clearly erroneous in this appeal. Thus, consideration of this criterion does not take this case out of the *Beer* analysis, and the District Court's disposition of this issue is entirely consistent with the holdings of other courts which have rejected county road equalization as a justification for racial discrimination in redistricting. See, e.g., *Kirksey v. Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 151 (5th Cir.) (*en banc*), cert. denied, 434 U.S. 968 (1977); *Robinson v. Commissioners Court*, 505 F.2d 674, 680 (5th Cir. 1974); cf. *Avery v. Midland County*, 390 U.S. 474, 484 (1968).¹⁸

Finally, the District Court did not err in failing to retain jurisdiction to review some other plan which plaintiffs might want to submit (J.S., pp. 23-25). Once the District Court had denied the requested declaratory judg-

¹⁸ To bootstrap their argument, appellants improperly rely on findings in a three-judge court decision which was reversed by this Court in *United States v. Board of Supervisors of Warren County*, *supra*, (J.S., p. 22 n.46). It is significant that one judge of that District Court, Circuit Judge Charles Clark, disregarded this criterion in ordering into effect for the November 27 special election a court-ordered plan which creates one district entirely within the city limits of Vicksburg (J.S., App. E, p. 27a).

ment, its § 5 jurisdiction technically was exhausted. The procedures of § 5 remain open to appellants to seek pre-clearance of a new plan either through submission to the Attorney General or through the filing of a new declaratory judgment action. No disruption of the electoral processes will occur since the county-district elections—the first since 1971—are scheduled to take place on November 27 under the new court-ordered plan ordered into effect in conformity with this Court's teachings in *Wise v. Libscomb*, 437 U.S. 535 (1978).

The action of the District Court here shows the continued efficacy of § 5 as a mechanism for blocking new schemes designed to eviscerate the gains made by passage of the Voting Rights Act. The enforcement of § 5 in this case was done, not in aid of any "affirmative action" program as appellants charge (J.S., p. 25), but to preserve preexisting levels of minority voting strength and to prevent them from being unalterably eroded. The District Court amply cited and followed the teachings of this Court in *Beer* in reaching its decision, and no substantial issues are presented.

CONCLUSION

The judgment of the District Court should be summarily affirmed.

Respectfully submitted,

FRANK R. PARKER
Lawyers' Committee for
Civil Rights Under Law
Post Office Box 1971
Jackson, Ms. 39205
(601) 948-5400

WILLIAM L. ROBINSON
RICHARD S. KOHN
Lawyers' Committee for
Civil Rights Under Law
520 Woodward Building
733 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 628-6700

*Attorneys for Private Appellees,
Eddie Thomas, Sr., et al.*

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